**IN THE**
**SUPREME COURT**
**STATE OF MISSOURI**
**No. SC83505**

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**DYNO NOBEL, INC.,**

**Appellant,**

**v.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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**FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION**
**THE HONORABLE WILLARD C. REINE, COMMISSIONER**

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# REPLY BRIEF OF APPELLANT

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## JURISDICTIONAL STATEMENT

In her brief, the Director asserts that this Court does not have jurisdiction of this appeal because the issues require only the application, rather than the construction, of Missouri revenue laws. This assertion, made without citation to any authority whatsoever, is incorrect.

For example, the Director, in her brief, argues that she may collect Missouri sales tax from a Missouri purchaser, Appellant, that did not provide an exemption certificate to the vendor, nor was charged Missouri sales tax by that vendor. In effect, she asks this Court to construe the language of Sections 144.020 and 144.210[1] to permit such an action. That construction issue is all that is required to invoke this Court's jurisdiction. *Housing Authority of Poplar Bluff v. Eastwood*, 736 S.W.2d 46 (Mo. banc 1987).

Additionally, the issue raised by the Director herself requires the construction of Section 144.190.3, specifically, the definition of the phrase "specific grounds upon which the claim is founded." This Court has consistently held that the construction of a protest mechanism to obtain overpaid taxes constitutes the construction of revenue laws within the meaning of Art. V, § 3 of the Missouri Constitution. *See, e.g., ASARCO, Incorporated v. McHenry*, 679 S.W.2d 863 (Mo. banc 1984).

In *Kuyper v. Stone County Commission*, 838 S.W.2d 436, 438 (Mo. banc 1992), this Court stated that Article V, § 3, granting this Court exclusive appellate jurisdiction in all cases involving the construction of Missouri revenue laws:

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[1] All statutory citations are to the Revised Statutes of Missouri of 2000, as amended.

> [S]peaks to the seriousness with which the people of this state view the efforts of government to reach into their pockets and pocketbooks…. [T]he people of this state intend their highest appellate court to determine the meaning and validity of laws by which the tax collector exacts tribute for the support of the government.

The Director's argument that this Court is without jurisdiction to decide this appeal is contrary to the language and purpose of Article V, § 3 of the Missouri Constitution. In short, jurisdiction of this appeal properly lies with this Court.

## STATEMENT OF FACTS

In her brief, the Director did not dispute any of the facts set forth in the brief of Appellant Dyno Nobel, Inc. ("Dyno"). The majority of her statement of facts (Dir. Br. 6-13) is a recitation of language in the Utility Agreement characterizing the unique business relationship between Dyno and Hercules, Inc. ("Hercules") referenced in Dyno's statement of facts (Dyno Br. 12).

The remainder of the Director's factual statement omits several significant facts that the Director seeks to ignore in her argument of this case, as discussed below, and also mischaracterizes Dyno's arguments before the Commission.[2] Therefore, Dyno respectfully suggests that this Court adopt the facts as set forth in the Statement of Facts in Dyno's opening brief.

[2] Specifically, the Director stated that "[t]he Commission also denied Dyno Nobel's alternative argument that it should not have to pay tax on the inputs into the electricity generation process, in addition to paying tax on its purchases of electricity" (Dir. Br. 18). Dyno has not made such an argument before the Commission, and does not do so before this Court because Dyno does not agree that it ever "purchased" electricity. Indeed, the Commission itself noted that "Dyno's counsel expressly stated that Dyno does not claim a manufacturing exemption for the electricity purchase" (L.F. 173).

## STANDARD OF REVIEW

In her statement of the standard of review, and throughout her brief, the Director ignores the relevant standard for this Court's review of the Commission's decision. The Commission entered summary determination against Dyno and in favor of the Director (L.F. 175). When reviewing a summary determination, this Court looks at all of the admissions submitted to the trial court, together with affidavits, to determine if there is any material fact issue to determine whether the prevailing party was entitled to judgment as a matter of law. *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993). In reviewing the record, this Court reviews the record in a light most favorable to the party against whom summary determination was entered. *Id*. Therefore, this Court's review of the facts presented to the Commission must be in the most favorable light to Dyno.

Dyno also notes that the Director did not dispute that this case involves tax imposition statutes which are to be strictly construed against the Director, and if the right to tax is not plainly conferred by statute, it will not be extended by implication. *United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. banc 1964), *quoting Leavell v. Blades*, 141 S.W. 893, 894 (Mo. 1911) ("When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it."). Nor did the Director dispute that this Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

## POINTS RELIED UPON

**I.**

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY DETERMINATION AND GRANTING THE DIRECTOR'S MOTION FOR SUMMARY DETERMINATION BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S REIMBURSEMENTS TO HERCULES FOR THE COSTS OF OPERATING THE ON-SITE UTILITIES PLANT ARE NOT SUBJECT TO MISSOURI TAX UNDER SECTIONS 144.020.1(3) AND 144.010.1(9) BECAUSE THE COST REIMBURSEMENTS DO NOT CONSTITUTE THE PURCHASES OF ELECTRICITY WITHIN THE MEANING OF THOSE SECTIONS.**

*Scothman's Coin Shop, Inc. V. Administrative Hearing Commission,* 654 S.W.2d 873 (Mo. banc 1983);

*Tauchert v. Boatmen's National Bank of St. Louis,* 849 S.W.2d 573 (Mo. banc 1993);

*Trailiner Corporation v. Director of Revenue,* 783 S.W.2d 917 (Mo. banc 1990).

**II.**

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY DETERMINATION AND GRANTING THE DIRECTOR'S MOTION FOR SUMMARY DETERMINATION BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT, ASSUMING, *ARGUENDO*, THAT APPELLANT'S REIMBURSEMENTS TO HERCULES FOR THE COSTS OF OPERATING THE UTILITIES PLANT ARE SUBJECT TO MISSOURI TAX, APPELLANT WAS NOT LIABLE FOR USE TAX ON THOSE REIMBURSEMENTS BECAUSE THE APPLICABLE TAX WOULD BE MISSOURI SALES TAX IMPOSED ON THE VENDOR, NOT UPON APPELLANT, AND BECAUSE APPELLANT PRESENTED THE BASIS FOR ITS CLAIM FOR REFUND IN ACCORDANCE WITH SECTION 144.190.3.**

*First National Bank of Fayetteville, Arkansas v. United States*, 727 F.2d 741 (8th Cir. 1984);

*Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.2d 560 (Mo. banc 2000);

*Santa Cruz Building Association v. Untied States*, 411 F. Supp 871 (E.D. Mo. 1976).

## ARGUMENT

### I.

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY DETERMINATION AND GRANTING THE DIRECTOR'S MOTION FOR SUMMARY DETERMINATION BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S REIMBURSEMENTS TO HERCULES FOR THE COSTS OF OPERATING THE ON-SITE UTILITIES PLANT ARE NOT SUBJECT TO MISSOURI TAX UNDER SECTIONS 144.020.1(3) AND 144.010.1(9) BECAUSE THE COST REIMBURSEMENTS DO NOT CONSTITUTE THE PURCHASES OF ELECTRICITY WITHIN THE MEANING OF THOSE SECTIONS.**

### Introduction

As stated in Dyno's opening brief, this appeal addresses the extremely unique business relationship between Dyno and Hercules. The Facility shared by Dyno and Hercules was originally owned entirely by Hercules, and was designed for one operator. The Facility has one electric loop circuit running throughout, and has one Utilities Plant designed to provide the necessary steam, electricity and water to operate the Facility.

When Dyno purchased a portion of the Facility in 1985, Dyno and Hercules were required to, and did, make arrangements to share utilities because of the Facility's design. Specifically, the parties agreed to allocate the costs of the Utilities Plant such that Dyno paid forty-five percent of the Utilities

Plant's fixed costs (that was due without regard to whether Dyno consumed electricity), and paid its share of the variable costs based upon its share of the consumption of electricity.

The Director argues that the cost sharing arrangement between Dyno and Hercules is a sale of electricity from Hercules to Dyno. ***The sole basis of the Director's argument is language in the Utilities Agreement between Dyno and Hercules that could be construed as indicative of a sale***. The Director asks this Court to ignore all of the other evidence in this case (including affidavits of the parties themselves, disinterested parties, parties with interests adverse to those of Dyno and Hercules, and the sworn statements of the Director's own auditor).

The Director also mischaracterizes Dyno's position in several parts of her brief. The Director disregards the applicable standard of review, and her legal arguments are contrary to the established precedents of this Court and the clear language of the applicable statutes. In short, Dyno's reimbursements to Hercules for the cost of the Utilities Plant shared by the parties do not constitute purchases of electricity within the meaning of Sections 144.020.1(3) and 144.010.1(9) because the reimbursements are not in consideration for any transfer of electricity.

### A. The Words in the Utilities Agreement Do Not Determine Taxation

The Director spends a great portion of her argument describing some of the language in the Utilities Agreement (Dir. 23-24). After noting language in the Utilities Agreement that can be construed as indicative of a sale, the Director concludes that the cost sharing between Dyno and Hercules constitutes a sale. She invites this Court to follow her conclusion by ignoring the other facts in the record, and the applicable law.

First, the Director notes that this Court may look behind the parties' characterization of a transaction to determine its taxability (Dir. Br. 24). *Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission*, 654 S.W.2d 873, 875 (Mo. banc 1983). However, she attempts to dismiss this precedent by stating that this Court never held that a party's characterization of a transaction is entirely irrelevant. Dyno has not, and does not, argue that the characterization of the transaction in the Utilities Agreement is not ***a*** relevant fact. Dyno's point, ignored by the Director and the Commission, is that it is not ***the only*** relevant fact. The Director's characterization of *Scotchman's Coin Shop* is misguided, at best.

Additionally, it is interesting to note that the Director focuses only on the language of the Utilities Agreement, and completely ignores the language of the Asset Purchase Agreement. As noted in Dyno's opening brief, (Dyno Br. 10-11; L.F. 160), Section 5.16 of the Asset Purchase Agreement provides that Hercules and Dyno:

> shall … agree in writing upon the provision of common services … including … ***appropriate sharing of raw materials and utilities***[3]

The Utilities Agreement was drafted pursuant to this requirement of the Asset Purchase Agreement. Thus, assuming *arguendo* that the Director's implicit position that only the texts of written agreements between Dyno and Hercules constitute relevant evidence presented to the Commission, the characterization of the nature of the relationship between Dyno and Hercules by the Commission cannot be sustained under the standard of review **requiring this Court to view the record in the**

[3] Emphasis added here and throughout, unless otherwise noted.

**light most favorable to Dyno**.[4] *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d at 574.

### B. The Weight of the Evidence Demonstrates that the Cost Reimbursements Were Not Sales of Electricity

The Director casually asserts that Hercules and Dyno apparently elected to structure the cost reimbursements as sales, a business decision, according to the Director "that is entirely consistent with other facts in the record" (Dir. Br. 25). The facts she cites in support of this statement belie the conclusion. Specifically, she states that "Hercules kept the means of producing electricity to itself, giving Dyno Nobel an option to purchase those means" (Dir. Br. 25). This is demonstrably incorrect. The Director's own statement of facts provides that "Dyno Nobel heats the water and pumps it back to Hercules for use in boilers that produce steam" that drives the turbines that drive the generators (Dir. Br. 14). Clearly, the heating facilities are one of the "means of producing electricity" that Hercules has not kept to itself, and thus, the Director's characterization of the facts she believes most favorable to her position is inaccurate.

Furthermore, all of the rest of the facts presented to the Commission demonstrate that the cost reimbursements did not constitute the purchase of electricity. As noted in Dyno's opening brief, Dyno

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[4] This Court has never held that the text of an agreement or series of agreements is the only relevant evidence in determining the intent of the parties when the intent is unclear on the face of the agreements. *See McDonnell Douglas Corporation v. Direcotr of Revenue*, 945 S.W.2d 437, 440 (Mo. banc 1997) (contrasting contract with clear title vesting provisions with those without clear provisions).

was liable for the fixed component of the costs of the Utilities Plant ***regardless of whether it consumed electricity*** (L.F. 94, 100-01). The Director does not deny these facts, nor does she dispute that Dyno, in fact, paid forty-five percent of the fixed operating costs even though Dyno was not operating its part of the Facility on at least three separate occasions (Dyno Br. 11; L.F. 167). Instead, she states that "the contract nowhere states that Dyno Nobel must pay whether it receives electricity or not" (Dir. Br. 26). While this statement is consistent with the Director's unstated assumption that the only relevant evidence is the text of the Utilities Agreement, it is not consistent with all of the evidence presented, and found as a matter of fact, by the Commission. That evidence showed that Dyno Nobel was liable for the fixed reimbursement, whether or not it consumed electricity (L.F. 167).

The Director also notes several cases in which this Court has held that fixed costs can be included in the consideration of a sale (Dir. Br. 27). These cases are irrelevant to this case; not one involved a dispute that a transfer of title had occurred and none involved situations in which payments of fixed costs were made in the absence of a transfer of something of value. These cases are inapposite.

In its opening brief, Dyno noted that numerous parties concluded that the relationship between Dyno and Hercules was one of cost sharing rather than a sale of electricity. Specifically, the evidence established that Ameren has the authority of the Missouri Public Service Commission ("PSC") for the territory the Facility served, and would benefit from a determination that the relationship was that of a vendor and vendee; Ameren nonetheless concluded that Dyno's cost reimbursements to Hercules were not sales of electricity (Dyno Br. 27; L.F. 88-89, 96, 102). The evidence also established that the Director's auditor and audit supervisors reached the same conclusion in the absence of the language of the Utility Agreement (Dyno Br. 27; Dep. 17, 45-46), a conclusion consistent with the fact that neither

Dyno nor Hercules has a certificate of authority from the PSC (L.F. 168). The Director attempts to avoid the implications of these facts in two ways, neither of which is availing.

First, the Director complains that the affidavits presented to the Commission do not reveal the details or standards of the investigation conducted by Ameren used in determining that the relationship between Dyno and Hercules was not that of a vendor and vendee (Dir. 28-29). Tellingly, she does not dispute Ameren's conclusion. The fact that the evidence of Ameren's treatment is not in the form the Director would like does not permit her, or this Court, to ignore the evidence, especially in view of the fact that the entire record in this case must be viewed in the light most favorable to Dyno. *Tauchert v. Boatmen's National Bank of St. Louis, supra.*

Likewise, the Director attempts to avoid the implications of her auditor's conclusion that the cost reimbursements were not sales of electricity. First, she states that the auditor, Richard Diein, was not auditing the transactions that are now before this Court (Dir. Br. 28). While Mr. Diein may not have audited Dyno's refund claim, he was the auditor responsible for auditing all of Dyno's activities. He spent more than two weeks at the Facility, and concluded that Dyno was due a refund on the tax it remitted on cost reimbursements (Dep. 11, 16-17, 22-23, 45). Second, the Director states that Mr. Diein did not have a copy of the Utilities Agreement when he made his determination (Dir. Br. 27). While true, this statement does not help the Director's cause. The fact that the auditor and his supervisors concluded, based on the pure economic substance of the relationship, that the cost reimbursements from Dyno to Hercules did not constitute the taxable sale of electricity decimates her argument that the record, viewed in the light most favorable to Dyno, supports the summary determination entered by the Commission.

The Director also attempts to avoid the facts in the record by mischaracterizing Dyno's arguments. The Director states that Dyno cited no authority that would bind this Court to the determinations of Ameren or its auditors (Dir. Br. 28-29). Dyno has not, and does not, suggest that the determinations of these third parties is binding upon this Court. However, these conclusions do constitute evidence of the various parties' intentions and show that the Director's characterization of the relationship between Dyno and Hercules is incorrect.

### C. The Analogies in Dyno's Opening Brief Demonstrate that the Director's Interpretation is Erroneous.

The Director's response to the analogies presented in Dyno's opening brief (Dyno Br. 25-26) demonstrates the fallacy of her position. With respect to the example of the college roommates ordering pizza and sharing the costs, the Director concedes that her position in this case requires the "theoretical" conclusion that one roommate is reselling a portion of the pizza to his roommate. But the Director states that taxability would depend upon whether the first student is engaged in "business" and whether the transaction is an "isolated or occasional sale" (Dir. Br. 25, n. 5). The Director's only solution to the dilemma caused by her position in this case is for all roommates to request "separate checks" from the delivery driver, separately allocating the respective amounts of pizza desired, and correctly apportioning the Missouri sales tax related thereto.

The Director does not even attempt to reconcile her position with the example of the same roommates sharing the costs of a telephone in a shared apartment. Under the Director's position, the roommate in whose name the telephone is registered is engaged in the retail sale of telephone services to the other roommates. Therefore, applying the Director's logic consistently, the first roommate should

be required to file a tariff with the PSC requesting the right to sell retail telephone services within the service area of the apartment.

In *Trailiner Corporation v. Director of Revenue*, 783 S.W.2d 917, 921 (Mo. banc 1990), this Court held that where the Director's interpretation of the law would produce an absurd result, this Court should reject such an interpretation in favor of one that avoids unjust and unreasonable ends. In that case, the Director's interpretation of the law would have exempted the repair of trailers while attached to truck-tractors, but tax those repaired while not so linked, an interpretation this Court considered absurd. *Id*. The Director's interpretation of the law in this case, which would require roommates to provide exemption certificates to pizza delivery drivers in cases in which a pizza would be shared and would require roommates to file tariffs with the PSC in order to allow other roommates to use a common telephone is at least as absurd as the Director's interpretation of the law in *Trailiner*. Thus, for this additional reason, the Commission's decision upholding the Director's interpretation of the law must be reversed.

In summary, the Commission's decision would reverse the long-standing Missouri rule that the economic realities of a transaction determine its taxability. Therefore, this Court should reverse the Commission and determine that Dyno is entitled to a refund of Missouri use tax paid because its cost reimbursements to Hercules do not constitute the taxable purchase of electricity; rather, those reimbursements are a sharing of their costs to jointly produce the same for their consumption at the Facility they share.

## II.

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY DETERMINATION AND GRANTING THE DIRECTOR'S MOTION FOR SUMMARY DETERMINATION BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT, ASSUMING, *ARGUENDO*, THAT APPELLANT'S REIMBURSEMENTS TO HERCULES FOR THE COSTS OF OPERATING THE UTILITIES PLANT ARE SUBJECT TO MISSOURI TAX, APPELLANT WAS NOT LIABLE FOR USE TAX ON THOSE REIMBURSEMENTS BECAUSE THE APPLICABLE TAX WOULD BE MISSOURI SALES TAX IMPOSED ON THE VENDOR, NOT UPON APPELLANT, AND BECAUSE APPELLANT PRESENTED THE BASIS FOR ITS CLAIM FOR REFUND IN ACCORDANCE WITH SECTION 144.190.3.**

### A. Dyno's Refund Claim Satisfied the Requirements of Section 144.190.3

In her brief, the Director challenges the Commission's finding that Dyno's refund claim satisfied the requirements of Section 144.190.3, which provides that "[e]very claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded." Because, as discussed below, the refund claim satisfies Section 144.190.3, the Director's arguments to the contrary are misplaced.

The requirement that every claim for refund state the specific grounds upon which the claim is founded in Section 144.190.3 is analogous to the requirement for a claim for refund for federal income tax set forth by Treas. Reg. § 301.6402-2(b)(1) that "the claim must set forth in detail each ground

upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."

In *First National Bank of Fayetteville, Arkansas v. United States*, 727 F.2d 741, 744 (8th Cir. 1984), the Court of Appeals construed that provision, stating:

> The reasons for the rule requiring a taxpayer to state the grounds for his claim are to "prevent surprise … to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination …to provide the Commissioner with an opportunity to correct any errors, and … to limit the scope of any ensuing litigation to those issues which have been examined…. (quotations omitted)

This rationale is nearly identical to the purpose of Section 144.190.3, as noted by this Court in *Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.2d 560, 563 (Mo. banc 2000):

> This requirement … has been read to require that the Director of Revenue be apprised of the grounds for the taxpayer's claimed refund in a manner which allows him to make a meaningful determination of the issues presented by the taxpayers (citations omitted).

Because the form and intent of the Missouri and federal specificity requirements are analogous, if not identical, federal authorities are instructive in determining compliance with the requirements of Section 144.190.3.

In *Santa Cruz Building Association v. United States*, 411 F. Supp. 871 (E.D. Mo. 1976), the court addressed a situation very similar to this case. In *Santa Cruz*, the plaintiff filed a claim for refund on the broad basis that the "Taxpayer qualifies as a tax-exempt organization." The United States argued that the court did not have jurisdiction to decide the merits of the claim because the refund claim did not satisfy the same "specificity" requirements the Director argues in this case. The court rejected this argument, noting that the purpose of the rule was to allow the IRS the opportunity to determine the merits of the claim in order to make a meaningful determination. The court then stated that the claim itself is not the only information upon which the IRS relies to determine the basis of the claim. *Id*. at 876. The court noted that, prior to denying the plaintiff's claim, the IRS was provided with and aware of previously filed documents claiming the tax exemption, including a history of the organization's activities and purposes. Therefore, because the IRS was aware of the facts necessary to make a determination of the taxpayer's claim, the court held that the taxpayer's broad statement in the claim for refund satisfied the specificity requirement. *See also Ottawa Silica Company v. United States*, 699 F.2d 1124, 1139 n.6 (Fed. Cir. 1983) (court may consider merits of refund claim when general grounds for relief were stated and IRS had adequate notice of facts of specific basis for claim).

In this case, Dyno's refund claim broadly states that "Taxes were incorrectly accrued ***on purchases that were not taxable to Dyno Nobel, Inc.***" (L.F. 27). The only fact necessary to determine that the transactions were exempt from use tax under Section 144.615(2), assuming *arguendo* that the cost reimbursements constituted taxable sales of electricity, is that Hercules and Dyno were located in Missouri, and that the transactions took place entirely in Missouri. The Director's attempts to obscure her actual knowledge of this fact are unavailing.

In support of her argument that she did not have knowledge of this fact, she states that the Utilities Agreement states that both Hercules and Dyno are Delaware corporations; that the Utilities Agreement described the Facility as being "near Louisiana, Missouri," a town located near the Illinois border; and that some invoices indicated a foreign "ship from" location. Even if this Court were inclined to accept the Director's allegation that these facts created confusion as to whether the purported sales of electricity took place in Missouri at face value, there is no dispute that the Director's own auditor spent two weeks at the Facility and clearly understood that the Facility was ***in Missouri*** and that all of the electricity generated at the Facility was generated ***in Missouri*** (Dep. 13-15). Because the auditor had this knowledge, he acknowledged that Dyno's claim for refund included this theory of overpayment (Dep. 34-35).

Because the Director had adequate knowledge of the facts underlying Dyno's refund claims, the cases she cites are not applicable here. For example, in *Kansas City Royals*, the Director's sole source of information prior to denying the refund claim was the claim itself. As noted in the Director's brief (Dir. Br. 33), the mentioning of the yearbooks was on one line of a 28-page spreadsheet and not differentiated from the "promotional items" identified in the body of the claim. On these facts, this Court concluded that the Director could not make a meaningful determination of the issues presented on the yearbooks. Likewise, in *DST Systems, Inc. v. Director of Revenue*, 799 S.W.2d 799, 804 (Mo. banc 2001), this Court refused to consider a manufacturing exemption claim when it was not presented in protest payment affidavits, the refund claim or even the complaints before the Commission, as it refused to consider a claim for refund in *International Business Machines Corporation v. Director of Revenue*, 765 S.W.2d 611, 612-13 (Mo. banc 1989) in the absence of adequate information before the Director. These cases are distinguishable. Here, the Director conducted a two-

week audit of Dyno prior to making a determination on the claim for refund. Thus, the Commission correctly concludes that Dyno's claim for refund satisfied Section 144.190.3.

### B. Assuming *Arguendo* That the Cost Reimbursements are Subject to Tax, They Are Subject to Missouri Sales Tax on Hercules and Not Missouri Use Tax On Dyno, Because It Provided no Exemption Certificates to Hercules

In its opening brief, Dyno noted that Section 144.610 imposes the Missouri use tax on all purchases that are used, consumed or stored in Missouri, and that Section 144.615(2) exempts from use tax, "property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed under the Missouri sales tax law" (Dyno Br. 32). Thus, as noted in Dyno's opening brief, if the cost reimbursements are taxable at all, they are subject to Missouri sales tax (Dyno Br. 32).

Section 144.210 provides that the Director may collect sales tax from a purchaser ***only*** if the purchaser provided an exemption certificate to the vendor (Dyno Br. 33). *See, e.g., Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996); *Bratton Corporation v. Director of Revenue*, 783 S.W.2d 891, 893 (Mo. banc 1990). Because Dyno never provided Hercules with an exemption certificate or other written evidence of exemption (L.F. 168), the Director is precluded from retaining Dyno's use tax payments to satisfy the alleged liability of Hercules for sales tax (Dyno Br. 33).

The Director did not dispute any of the foregoing statements in Dyno's opening brief. Rather, she advances various arguments that she is entitled to keep tax paid by the wrong taxpayer.

First, she cites *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 718 (Mo. banc 1998) for the proposition that voluntarily paid taxes need not be refunded. While this is a generally true statement of law, this Court in *Ring* followed by stating:

> Thus, for [taxing entity] to face the possibility of any liability to those who paid the unconstitutional fee increase, there must be a waiver of sovereign immunity and the persons claiming a refund or credit must have complied with the terms of the waiver of sovereign immunity….

In this case, Section 144.190 constitutes a waiver of sovereign immunity. Because, as discussed above, Dyno satisfied the requirements of Section 144.190, the Director's reliance upon *Ring* is misplaced.[5]

The Director's final argument is that "if Dyno Nobel is due a refund because the transactions were subject to sales tax instead of use tax, no money should be refunded to Dyno Nobel. Instead, any ***use tax*** amounts that were paid ***should*** be applied to the ***sales tax*** that was due on the transaction" (Dir. Br. 35-36). The Director cites no authority in support of this argument, and makes no attempt to distinguish the statutes and cases cited by Dyno in opposition to this point. In essence, the Director argues that if she has collected the correct amount of tax (a proposition that Dyno disputes under Point I), ***but from the wrong taxpayer***, that is close enough for government work. The Director knows that the incidence of sales tax is on the vendor, and that is why the Director frequently pursues vendors for sales tax on past transactions, even when the Director knows that those vendors have no ability to recoup the tax from consumers. *See, e.g., Kanakuk-Kanakomo Kamps, Inc. v. Director of*

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[5] The Director also erroneously claims that Dyno did not pay any sales tax on the inputs used to produce electricity at the Facility (Dir. Br. 35). That assertion is patently incorrect as the record demonstrates that Dyno's cost reimbursements included its share of all taxes imposed on any utility plant purchases (L.F. 88-89, 93-94, 100-101).

*Revenue*, 8 S.W.3d 94 (Mo. banc 1999) (Director successfully pursues sales tax assessment against operator of summer camps at which approximately 9,500 campers stay each summer); *Bolivar Road News, Inc. v. Director of Revenue*, 13 S.W.3d 297 (Mo. banc 2000) (Director successfully pursues sales tax assessment for three-year period on token sales at place of amusement).

Furthermore, it is obvious that the General Assembly intended to impose the sales tax on the seller of tangible personal property or taxable services. This intent is demonstrated by its enactment of Section 144.021 in 1965. Prior to that time, the Missouri sales tax was imposed directly on purchasers, and required collection by sellers. It is obvious that the Director is now trying to enlist this Court in reversing the imposition of the Missouri sales tax to the position rejected by the General Assembly more than thirty years ago.

Dyno overpaid Missouri use tax because the cost reimbursements (even if they constitute the taxable purchase of electricity) are expressly exempt from Missouri use tax under Section 144.615(2). Because Dyno overpaid the tax, Dyno is entitled to a refund pursuant to Sections 144.696 and 144.190.

## CONCLUSION

Based on the foregoing and for the reasons set forth in Appellant's opening brief, Appellant respectfully requests that this Court reverse the Commission and remand with instructions to sustain Appellant's refund claim.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this _____ day of January 2002, to Deputy State Solicitor Alana Barragan-Scott, P.O. Box 899, Jefferson City, Missouri 65102.

_____

## CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains _5,896 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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